89-1985
No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

v.

HYDROSTORAGE, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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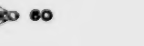

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-2798, 88-2800, 88-2802, 88-2966,
88-2968 and 88-2969

HYDROSTORAGE, INC., a Tennessee Corporation,
Plaintiff-Appellee,

v.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, in his capacity as Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted May 8, 1989
Decided Dec. 6, 1989

John M. Rea, Chief Counsel, Dept. of Indus. Relations, Miles Washington, Deputy Atty. Gen., David A. Rosenfeld, Van Bourg, Weinberg, Roger & Rosenfeld, and Marsha S. Berzon, Altshuler & Berzon, San Francisco, Cal., for defendants-appellants.

Karen E. Ford, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for plaintiff-appellee; James P. Baker, San Francisco, Cal., on brief.

Before WALLACE and NOONAN, Circuit Judges, and BURNS,* District Judge.

WALLACE, Circuit Judge:

In these consolidated appeals, the Northern California Boilermakers Joint Local Apprenticeship Committee, California Apprenticeship Council, and California Division of Apprenticeship Standards (collectively Boilermakers) appeal from the district court's summary judgment in favor of Hydrostorage, Inc. (Hydrostorage). The district court enjoined the enforcement of an administrative order against Hydrostorage, concluding that such enforcement was preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a), and by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* On appeal, Boilermakers argue that the district court (1) lacked subject matter jurisdiction, (2) erred in failing to abstain under either the *Younger* or *Pullman* doctrines, and (3) erred in granting summary judgment based on ERISA and NLRA preemption. The district court exercised jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

This case arises out of California's efforts to regulate apprenticeship on public works projects. Cailifornia's general administrative framework for regulating apprenticeships is complex. The California Apprenticeship Council (Council) is a six-member entity created by state statute and empowered to issue rules and regulations establishing minimum standards of wages, hours, and

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* Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

working conditions for apprentices. Cal. Labor Code §§ 3070, 3071 (West Supp.1989). The Council is located in the Division of Apprenticeship Standards (Division), which in turn is part of California's Department of Industrial Relations. *Id.* The Director of Industrial Relations serves as the Administrator of Apprenticeship (Administrator), in which capacity he or his delegees carry out such duties as investigating and determining charges of alleged violations of the terms of apprenticeship agreements. Cal. Labor Code §§ 3072, 3081 (1971); 8 Cal. Code § 202 (1988). A determination by the Administrator may be appealed to the Council. Cal. Labor Code § 3082 (West Supp.1989); 3 Cal.Code Reg. § 203 (1988).

The Division approves written apprenticeship standards which are submitted to it, if those standards conform to the Council's minimum requirements. Cal. Labor Code § 3073 (West Supp.1989); 8 Cal.Code Reg. § 212 (1988). Standards of apprenticeship may be submitted for approval by any "apprenticeship program sponsor," which includes joint apprenticeship committees, unilateral labor or management apprenticeship committees, or individual employers. Cal. Labor Code § 3075 (West Supp.1989). For the craft of boilermaker, the Council in May 1974 approved a set of apprenticeship standards contained in a document entitled "Boilermakers Standards of Apprenticeship for Field Construction and Repair in Eight Western States Area" (Standards). Subsequent to 1974, the Standards were amended to implement an equal employment opportunity program approved by the Division.

An employer in California may gain the right and responsibility to train Boilermaker apprentices in either of two ways. Employers who are signatory to the collective bargaining agreement with the relevant union—the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers (Union)—become bound to the Standards by virtue of a clause in the collective bargaining agreement which so stipulates. On the other hand, employers who are not parties to the

collective bargaining agreement (such as non-union contractors or contractors signatory to some other collective bargaining agreement) must apply to a local joint apprenticeship committee for approval to train on public workers projects in accordance with the Standards. Cal. Labor Code § 1777.5 (West Supp.1989); 8 Cal.Code Reg. § 229 (1988). Contractors approved to train by the joint apprenticeship committee are sent a certificate of approval.

Hydrostorage, a Tennessee corporation, is not a signatory to the Union's collective bargaining agreement. Hydrostorage is a contractor engaged in the construction of water storage facilities. Much of Hydrostorage's work consists of public works projects. In the fall of 1986, Hydrostorage was awarded a public works contract to construct a water storage tank for the Lathrop County Water District in Lathrop, California (Lathrop project).

The State of California imposes certain conditions relating to apprentices upon contractors and subcontractors who perform contracts awarded by the state or its political subdivisions. *See* Cal. Labor Code § 1777.5 (West Supp.1989).[1] Under section 1777.5 of the California

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[1] Section 1777.5 of the Labor Code provides in part:

> Every . . . apprentice [employed on a public works project] shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.
>
> Only apprentices . . . who are in training under apprenticeship standards and written apprentice agreements . . . are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.
>
> When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or

Labor Code, contractors, with certain exceptions not relevant to this case, must (1) "apply to the joint apprenticeship committee administering the apprenticeship

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trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contract of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts

standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected"; (2) employ apprentices in a ratio of no less than one apprentice for every five journeymen; and (3) "contribute to the fund or funds in each craft or trade in which [the contractor] employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do." *Id.* As for the contribution requirement, if apprenticeship "trust fund administrators are unable to accept [the] funds, contractors not signatory to the trust agreement" must pay "a like amount to the California Apprenticeship Council." *Id.*

The Northern California Boilermakers Local Joint Apprenticeship Committee (Committee) administers the approved apprenticeship standards for the boilermaker craft in the Lathrop area. The Committee is composed of

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of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

. . . .

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs juourneymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract.

equal numbers of persons appointed by labor and management. *See* Cal. Labor Code § 3075 (West Supp.1989).

For willful noncompliance with section 1777.5's requirements, a contractor is subject to civil penalties and debarment from bidding on public works contracts for one year. *Id.* § 1777.7. The parties do not dispute that section 1777.5 applies to the Lathrop project, or that Hydrostorage neither applied to the Committee for a certificate of approval nor employed any apprentices on the project.

On September 25, 1986, the Committee filed a complaint regarding the Lathrop project with the Division. The Division investigated the allegations and issued an administrative complaint against Hydrostorage on January 26, 1987. The administrative complaint alleged that Hydrostorage had violated section 1777.5 by failing to (1) apply for permission to employ and train apprentices, (2) make timely contributions to the apprenticeship trust fund, and (3) employ apprentices in the legally required ratio. The complaint was scheduled to be heard before a hearing officer on May 14, 1987.

On May 13, one day before the administrative hearing was scheduled to take place, Hydrostorage filed an action in federal court, seeking a declaration that section 1777.5 was preempted by ERISA and the NLRA. Hydrostorage also sought a preliminary injunction against the administrative proceedings. At a hearing on May 13, 1987, the district judge refused to issue a temporary restraining order (TRO) against the administrative hearing. The administrative hearing took place as scheduled on the following day.

After various motions were filed in the federal action, the district court entered an order of abstention on September 25, 1987, based upon the existence of pending state judicial or administrative proceedings.

Two days later, on September 27, 1987, the administrative determination was issued. The Director of the Divi-

sion found that Hydrostorage had willfully violated section 1777.5 "by failing to apply to the [Committee] for approval to train apprentices in the Lathrop Project [and] by failing to employ the mandatory ratio of apprentices to journeymen on the Lathrop project." The Director ordered Hydrostorage barred from bidding on public works contracts for one year and assessed a civil penalty. *Id.*

Although the administrative complaint had alleged that Hydrostorage had violated section 1777.5 by "fail[ing] to make timely contributions to the training fund or the California Apprenticeship Counsel," the Division found no willful violation of this charge. Instead, the Division regarded Hydrostorage's contributions to the Council, a state agency, as sufficient to satisfy the statutory requirement.

Hydrostorage filed a timely administrative appeal of the determination to the Council's Appeal Board. *See id.* § 3082. The Council issued its decision on January 28, 1988, reversing the administrator's determination that Hydrostorage had *willfully* failed to train apprentices in the required ratio, but affirmed the determination that Hydrostorage had willfully failed to apply for approval to train apprentices.

Hydrostorage then returned to federal district court. On March 3, 1988, Hydrostorage filed an amended complaint in its original action and again sought a TRO, this time to prevent the Council's decision from being enforced. Hydrostorage also filed a second federal action alleging virtually identical claims and asserting subject matter jurisdiction under both diversity and federal question statutes. In the second action, Hydrostorage sought an injunction as well as a writ of mandate pursuant to California Code of Civil Procedure § 1094.5, which permits review in state court of final administrative orders. *See* Cal. Civil Proc.Code § 1094.5 (West Supp. 1989).

A hearing on the TRO application was held on March 3, 1988, before the district judge presiding over Hydrostorage's original action. The judge denied Hydrostorage's request for a TRO, stayed the effect of the Council's administrative order, ordered Hydrostorage's two actions consolidated, and scheduled a hearing on Hydrostorage's motion for summary judgment for April 15.

After the hearing, on May 4, 1988, the district court, in a published opinion and order, granted Hydrostorage's motion for summary judgment in the consolidated cases. *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 685 F.Supp. 718 (N.D.Cal.1988). The court's ruling was based on two independent grounds: the administrative order was preempted both by ERISA and by the NLRA. *Id.* at 720-25. The court was careful not to rule on whether section 1777.5 was preempted by either ERISA or the NLRA. *See id.* at 723 ("The Court has not been asked to strike down § 1777.5 nor does it do so by this order which holds only that *as applied in this case* it is preempted by ERISA." (emphasis added); *id.* at 725 ("Because application of the [administrative] determination and order would in this case have th[e] effect [of requiring Hydrostorage to become a party to a collective bargaining agreement] it is barred by the NLRA . . . ."). From this summary judgment, the Committee, Division, and Council filed separate timely appeals, which were consolidated.

II

Boilermakers first argue that the district court lacked subject matter jurisdiction. This issue presents a question of law which we review de novo. *Guadamuz v. Bowen*, 859 F.2d 762, 766 (9th Cir.1988).

The district court did not explain why it had subject matter jurisdiction under 28 U.S.C. § 1331, but merely cited footnote 14 of *Shaw v. Delta Air Lines, Inc.*, 463

U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (*Shaw*). 685 F.Supp. at 719. *Shaw* involved a challenge to two New York statutes governing pregnancy benefits on the grounds that they were preempted by ERISA. *Shaw*, 463 U.S. at 88, 103 S.Ct. at 2895. Plaintiffs were employers who maintained ERISA employee benefit plans which provided certain medical and disability benefits. *Id.* at 92, 103 S.Ct. at 2897. In a footnote, the Court explained:

> The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust* [463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)], does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* preempted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.
>
> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-62 [28 S.Ct. 441, 454-55, 52 L.Ed. 714] (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.

Id. at 96 n. 14, 103 S.Ct. at 2899 n. 14 (citations omitted) (emphasis in original).

The Council attempts to distinguish *Shaw* by arguing that unlike the plaintiffs there, Hydrostorage is not an

"employer" within the meaning of ERISA. *See* 29 U.S.C. § 1002(5) (defining "employer" for ERISA purposes as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan"). This argument suggests that footnote 14 distinguishes *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), as turning on the presence in *Shaw* of "companies *subject to ERISA regulation.*" *Shaw*, 463 U.S. at 96 n. 14, 103 S.Ct. at 2899 n. 14. The Council further argues that because Hydrostorage is not an "employer" under ERISA, it cannot state a claim under 29 U.S.C. § 1132(a), which authorizes various persons to bring civil actions for ERISA violations. 29 U.S.C. § 1132(a) (authorizing actions to enforce ERISA by Secretary of Labor, and by participants, fiduciaries, or beneficiaries of ERISA trusts); *see also Fentron Industries, Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 & n. 6 (9th Cir.1982) (employers may also sue under 29 U.S.C. § 1132). Nor, according to the Council, is Hydrostorage either a "participant" or a "beneficiary" of an ERISA fund, as those terms are defined by statute. 29 U.S.C. § 1002(2)(B)(7) & (8). Thus, argues the Council, the district court lacked subject matter jurisdiction.

The Council misconceives the nature of this action and the meaning of the *Shaw* footnote. This is not an action brought directly under 29 U.S.C. § 1132(a). It is an action for injunctive and declaratory relief from state regulation based on federal question jurisdiction, 28 U.S.C. § 1331. *See New Orleans Public Service, Inc. v. New Orleans*, 782 F.2d 1236, 1240-41 (5th Cir.), (*New Orleans*), *amended*, 798 F.2d 858 (1986), *cert. denied*, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 515 (1987). As the Court in *Shaw* asserted, "[a] plaintiff who seeks *injunctive* relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Con-

stitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." 463 U.S. at 96 n. 14, 103 S.Ct. at 2899 n. 14 (emphasis added); *see also Lawrence County v Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 259 n. 6, 105 S.Ct. 695, 697 n. 6, 83 L.Ed.2d 635 (1985). This rule has been applied in numerous cases in this and other circuits. *See, e.g., Martori Brothers Distributors v. James-Massengale*, 781 F.2d 1349, 1353 (9th Cir.) (*Martori*), *amended*, 791 F.2d 799, *cert. denied*, 479 U.S. 949, 107 S.Ct. 435, 93 L.Ed.2d 385 (1986); *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1288 (9th Cir.1983), *cert. denied*, 466 U.S. 936, 104 S.Ct. 1908, 80 L.Ed.2d 457 (1984); *Colonial Penn Group, Inc. v. Colonial Deposit Co.*, 834 F.2d 229, 236-37 (1st Cir.1987); *New Orleans*, 782 F.2d at 1240-41; *Aluminum Co. of America v. Utilities Commission of North Carolina*, 713 F.2d 1024, 1028 (4th Cir.1983), *cert. denied*, 465 U.S. 1052, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984); *Pacific Merchant Shipping Association v. Aubry*, 709 F.Supp. 1516, 1521-22 (C.D. Cal.1989). Here, Hydrostorage is seeking, among other remedies, injunctive relief from regulation, arguing that the underlying state statutes are preempted under the supremacy clause by ERISA. In a case such as this, the supremacy clause and the federal statute provide subject matter jurisdiction under 28 U.S.C. § 1331. We conclude that the district court had jurisdiction under 28 U.S.C. § 1331.

III

The Council next argues that the district court should have abstained from exercising jurisdiction under either the *Pullman* or *Younger* abstention doctrines. The Council argues that this court "has the authority to apply the doctrine of abstention regardless of whether the issue was raised before the District Court or even before this Court." We agree. *See Bellotti v. Baird*, 428 U.S. 132, 143-44 n. 10, 96 S.Ct. 2857, 2864-65 n. 10, 49 L.Ed.2d 844

(1976) (abstention may be properly raised *sua sponte*); *Richardson v. Koshiba*, 693 F.2d 911, 915 (9th Cir. 1982) (though neither party briefed issue of *Pullman* abstention, panel raised it at oral argument and disposed of case on this ground). But we are not required to do so since it does not implicate our subject matter jurisdiction. *See Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 479-80, 97 S.Ct. 1898, 1903-04, 52 L.Ed.2d 513 (1977); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n. 6 (5th Cir.1978) (en banc) ("Appellant did not raise the question of *Younger* abstention [on appeal], and that issue, being nonjurisdictional, is thus not before this court."), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (per curiam); *Schachter v. Whalen*, 581 F.2d 35, 36 n. 1 (2d Cir.1978) ("*Younger* abstention goes to the exercise of equity jurisdiction, not to the jurisdiction of the federal district court as such to hear the case.").

Although the district court abstained under *Younger* pending completion of the state administrative proceedings, it heard and decided Hydrostorage's motion for summary judgment after the Council's decision was rendered. None of the appellants argued in the district court for abstention under *Younger* or *Pullman* after the Council decided Hydrostorage's administrative appeal. Under these circumstances, when the district court did not consider the issue, we decline to address abstention on appeal. *See Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115-16 n. 19 (9th Cir.1987) (since party did not raise abstention issues in trial court, appellate court need not consider them on appeal).

IV

Boilermakers next argue that the district court erred in concluding that ERISA preempts the administrative order in this case. We review a summary judgment de novo. *Rutledge v. Arizona Board of Regents*, 859 F.2d

732, 734 (9th Cir.1988); *General Motors Corp. v. California State Board of Equalization*, 815 F.2d 1305, 1309 (9th Cir.1987) (summary judgment based on ERISA-preemption reviewed de novo), *cert. denied*, —— U.S. ——, 108 S.Ct. 1122, 99 L.Ed.2d 282 (1988). Because there are no contested issues of fact, we need decide only whether the substantive law was applied correctly. *Martori*, 781 F.2d at 1351.

ERISA is a "comprehensive remedial statute 'designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans.'" *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1217 (9th Cir.), (*Jones*), *aff'd*, —— U.S. ——, 109 S.Ct. 210, 102 L.Ed.2d 202 (1988), *quoting Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501 (9th Cir.1985). The statute "sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits." *Massachusetts v. Morash*, —— U.S. ——, 109 S.Ct. 1668, 1677-72, 104 L.Ed.2d 98 (1989) (*Morash*).

ERISA governs "employee benefit plans," which are statutorily defined as plans that are either an "employee welfare benefit plan," an "employee pension benefit plan," or both. 29 U.S.C. § 1002(3); *Morash*, 109 S.Ct. at 1672. The statute defines "employee welfare benefit plan" as follows:

> any *plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer only by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance *or otherwise*, (A)

> medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services. . . .

29 U.S.C. § 1002(1) (emphasis added).

ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . ." 29 U.S.C. § 1144(a) (emphasis added). "State laws" are defined as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). A "state" is defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2).

Several exceptions exist to ERISA's broad preemption clause. Only one such exception is relevant to this case, however: ERISA's so-called "savings clause." Section 514(d) of ERISA, codified at 29 U.S.C. § 1144(d), provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d).

Applying these statutory provisions, the district court held that the Council's order was preempted by ERISA. 685 F.Supp. at 723. The district court first reasoned that "the Apprenticeship Program under the Boilermakers collective bargaining agreement" constituted an ERISA employee welfare benefit plan. *Id.* at 721: Next, the court determined that administrative order against Hydrostor-

age was preempted under section 514(a), 29 U.S.C. § 1144(a). *Id.* Finally, the court held that the administrative order was not saved by section 514(d), ERISA's savings clause. *Id.* at 723.

On appeal, Boilermakers have challenged each of these steps in the district court's analysis. We address them in turn.

A.

We first consider whether this case involves an "employee benefit plan," a necessary predicate for the applicability of ERISA. The parties do not contend that any "employee pension benefit plan" is involved here. Instead, they properly focus on whether there is an "employee welfare benefit plan." To answer this question, we must consider whether this case involves a "*plan, fund, or program* . . . established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants . . . *apprenticeship or other training programs.*" 29 U.S.C. § 1002(1) (emphasis added).

ERISA does not define the terms "plan," "fund," "program," or "apprenticeship training program." *See Morash*, 109 S.Ct. at 1672. Regulations issued by the Secretary of Labor under authority delegated by statute similarly fail to define these terms. *See* 29 C.F.R. § 2510.3-1 (1988); 29 U.S.C. § 1135. Moreover, of the very few reported decisions involving ERISA and apprenticeship funds or programs, none defines or analyzes the term "apprenticeship training program." In the absence of such guidance, we "must give effect to [the statute's] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97, 103 S.Ct. at 2900; *see also id.* at 97 n. 16, 103 S.Ct. at 2900 n. 16 (quoting *Black's Law Dictionary* definitions in determining the meaning of phrase "relates to" in ERISA's preemption clause).

The district court applied the plain meaning of the statute. In explaining why this case involved an employee welfare benefit plan, the district court wrote:

> There can be no question that the Apprenticeship Program under the Boilermakers collective bargaining agreement falls within the literal scope of [29 U.S.C. § 102(1)'s] definition. It comprises a plan, fund, and program maintained by employers and the bargaining representative of their employees to provide its participants with apprenticeship training. That the Apprenticeship Fund itself may also be governed to an extent by other federal laws, as [the Division] argues, in no way takes the Apprenticeship Program out of the statutory definition.

685 F.Supp. at 721 (footnote omitted). It is unclear to us precisely what the district court meant by the "Apprenticeship Program." This term conceivably could encompass the apprenticeship trust fund, the Standards, and even the Committee.

A "fund" has been defined as "[a]n asset or group of assets set aside for a specific purpose," or "[a] sum of money or other liquid assets set apart for a specific purpose, or available for the payment of debts or claims." *Black's Law Dictionary* 606 (5th ed. 1979). A "plan" has been described as "a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. [A] [m]ethod of putting into effect an intention or proposal." *Id.* at 1036 (citation omitted). Although *Black's Law Dictionary* does not supply a definition of "program," another prominent dictionary defines a program as a "plan of procedure," "schedule or system under which action may be taken toward a desired goal," or "proposed project or scheme." *Webster's Third New International Dictionary* 1812 (1971).

We recently held that an apprenticeship training fund is an employee welfare benefit plan under ERISA. *Jones*, 846 F.2d at 1217 ("Since the [local apprenticeship fund]

is established to provide 'apprenticeship or other training programs,' it is an 'employee welfare benefit plan' within the meaning of ERISA."). The parties agree that the Boilermakers' apprenticeship trust fund (Fund) qualifies as an ERISA employee benefit plan.

A more difficult question is whether the Standards constitute an "employee welfare benefit plan," i.e., a "plan" or "program" which was "established or maintained by an employer or by an employee organization, or by both, . . . for the purpose of providing for its participants . . . apprenticeship or other training programs." 29 U.S.C. § 1002(1). We conclude that the Standards satisfy this definition. The Standards consist of a detailed, 16-page document which specifies the duties and procedure of the Committee, the minimum qualifications of apprentices, the maximum ratio of apprentices to journeymen on job locations, the terms and conditions of apprenticeships, and the hours and wages of apprentices. The Standards also provide for supplemental instruction as well as period examination of apprentices. The Standards clearly embody "a method of design or action, procedure, or arrangement for accomplishment of a particular . . . object," in this case the training of apprentices. *Black's Law Dictionary* 1036 (5th ed. 1979). In addition, there is no question that the Standards were established "for the purpose of providing for its participants . . . apprenticeship or other training programs." 29 U.S.C. § 1002(1). The Standards's stated purpose is "the training of Boilermakers, skilled in all phases of the erection and repair industry, who will be a credit to the industry." Finally, the Standards were established by the Committee, an entity created by the collective bargaining agreement and composed of equal numbers of representatives of labor and management. As such, the Committee qualifies as "an employer or . . . employee organization, or . . . both." *Id.*

The Standards are an integral part of a larger "program" established for the purpose of providing "appren-

ticeship . . . training." *Id.* Thus, both the Fund and the Standards fall within the definition of an "employee welfare benefit plan" under ERISA.

We need not decide whether the Committee itself, whose functions include the formulation and administration of the Standards, is also part of the employee welfare benefit plan. The Division strenuously argues that while the Fund is an ERISA plan, the Committee is not. The resolution of this issue has no bearing on our decision. Since the Standards and Fund constitute an ERISA plan, this case clearly falls within the coverage of ERISA.

The Division argues, however, that we should eschew a literal interpretation of ERISA's definition and defer instead to Congress's broader purpose behind the statute. While the Supreme Court has recognized that various provisions in ERISA are " 'perhaps . . . not a model of legislative drafting,' " *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 1552, 95 L.Ed2d 39 (1987) (*Pilot Life*) (referring to preemption and insurance savings clauses), *quoting Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2388, 85 L.Ed.2d 728 (1985) (*Metropolitan Life*), and that in particular the term "employee benefit plan" is "defined only tautologically in the statute," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8, 107 S.Ct. 2211, 2216, 96 L.Ed.2d 1 (1987) (*Coyne*), it also frequently has looked to the plain meaning of statutory language. *See id.* at 7-8, 107 S.Ct. at 2215-2216; *Metropolitan Life*, 471 U.S. at 740, 105 S.Ct. at 2389; *Shaw*, 463 U.S. at 97 & n. 16, 103 S.Ct. at 2900 & n. 16. In addition, the Division acknowledges that ERISA's legislative history fails to address what "plan, fund or program" means in the context of apprenticeship training programs. Perhaps the reason for this is that Congress, in enacting ERISA, focused on the regulation of employee *pension* benefit plans and spent little time considering employee *welfare* benefit plans. *See* Brummond, *Federal*

Preemption of State Insurance Regulation Under ERISA, 62 Iowa L.Rev. 57, 113-22 (1976).

The Division's argument is essentially one for statutory revision and is properly directed to the Legislative Branch. *See Shaw*, 463 U.S. at 106, 103 S.Ct. at 2904 ("To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of congressional choice and should be addressed by congressional action."). The statute is clear on its face. Our commission is to follow its precepts. We are not allowed to amend the statute though the Division's suggested interpretation. We conclude that the Standards and Fund are an ERISA plan.

B.

We must next consider whether the Council's order falls under ERISA's preemption clause, which preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a). In recent years, the Supreme Court has examined the scope of ERISA preemption on numerous occasions. *See, e.g., Morash*, 109 S.Ct. 1668; *Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (*Mackey*); *Coyne*, 482 U.S. 1, 107 S.Ct. 2211; *Pilot Life*, 481 U.S. 41, 107 S.Ct. 1549; *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Metropolitan Life*, 471 U.S. 724; 105 S.Ct. 2380; *Shaw*, 463 U.S. 85, 103 S.Ct. 2890; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) (*Alessi*). The Court has stated that "the express preemption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life*, 481 U.S. at 45-46, 107 S.Ct. at 1551-52, *quoting Alessi*, 451 U.S. at 523, 101 S.Ct. at 1906.

There is no question that the Council's administrative order against Hydrostorage constitutes a "state law"

within the meaning of ERISA. *See* 29 U.S.C. § 1144 (c) (1) (defining "state laws" as "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State"). The Council's order has the effect of law in California. Furthermore, the Council comes within ERISA's definition of a "state" because it is included within "a State, and political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employeee benefit plans covered by this subchapter." 29 U.S.C. § 1144 (c) (2).

More difficult is the issue of whether the administrative order "relates to" an ERISA employee benefit plan. We have required that a state law both "relate to," 29 U.S.C. § 1144 (a), and "purport[] to regulate, directly or indirectly," 29 U.S.C. § 1144 (c), an employee welfare benefit plan in order for it to be preempted. *Jones*, 846 F.2d at 1218; *Martori*, 781 F.2d at 1356. "'A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Shaw*, 463 U.S. at 96-97, 103 S.Ct. at 2899-900. A law purports to regulate a plan if it attempts to reach in one way or another the terms and conditions of employee benefit plans. *Jones*, 846 F.2d at 1218; *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984).

Boilermakers argue that section 1777.5 does not "relate to" or "purport to regulate" an ERISA plan. The district court reasoned that the Council's order "relates to" an ERISA plan because it "compel[s] Hydrostorage to participate in and contribute to the Boilermakers Apprenticeship Program" and because section 1777.5, upon which the order was based, "establishes the manner in which contractors must participate in the Apprenticeship Program and fund its costs." 685 F.Supp. at 721. As for our additional requirement that the challenged state law "purport[] to regulate, directly or indirectly" an[] ERISA plan, the district court concluded that "there

can be no question but that § 1777.5 regulates apprenticeship program[s]." *Id.* at 721 n. 6. Although we disagree with some of the district court's reasoning, we agree with its conclusion that the administrative order against Hydrostorage falls under ERISA's preemption clause.

First, the order clearly "relates to" the Standards, which are part of an ERISA plan. Hydrostorage was sanctioned for failing to apply to the Committee for permission to train apprentices on the Lathrop project. The very purpose of requiring Hydrostorage to apply was so that Hydrostorage would become bound by the Standards, an ERISA plan. Hydrostorage would have been required to sign a DAS-7 form entitled "Agreement to Train Apprentices." By signing a DAS-7 form, Hydrostorage would agree "to train apprentices in the designated occupation in accordance with the *apprenticeship standards* and apprenticeship agreement and to comply with the provisions thereof." The "apprenticeship standards" in this case are the Standards, an ERISA plan. Thus, the order undoubtedly "relates to" an ERISA plan in the sense that the order has a "connection with or reference to" the Standards.

Second, we conclude that the administrative order purports to regulate, indirectly or directly," an ERISA plan. Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan. *See Metropolitan Life*, 471 U.S. at 739, 105 S.Ct. at 2388 (Massachusetts law requiring ERISA plans to provide minimum coverage for mental health care expenses "bears indirectly but substantially" on plans since "it requires them to purchase the mental-health benefits specified in the statute"). The order is designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order was based, California Labor Code § 1777.5. Section 1777.5 is aimed at enforcing the terms of an

ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans. The underlying statute is therefore one which is specifically designed to affect employee benefit plans. *See Mackey*, 108 S.Ct. at 2185 ("[W]e have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under § 514(a).") (citations and internal quotations omitted). We therefore conclude that the administrative order falls within ERISA's preemption clause.

The Committee argues, however, that section 1777.5 does not "purport to regulate" because it "applies only when the state is purchasing services in the marketplace, and simply expresses a decision as to the terms upon which the state chooses to do business." In essence, the Committee argues that California is acting as a "marketplace participant," not a regulator. The Committee relies on a series of dormant commerce clause cases which discuss the market participant theory.

There are two reasons why we reject the Committee's "market participant" argument. First, as the Supreme Court observed in rejecting a similar argument in a case involving NLRA preemption, *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282, 106 S.Ct. 1057, 89 L.Ed.2d 223 (1986), "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Id.* at 289, 106 S.Ct. at 1062; *see also id* at 290, 106 S.Ct. at 1063 ("What the Commerce Clause would permit States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place."). Second, California in this case is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors

who work on public contracts. The Division, part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation."

C.

Finally, Boilermakers argue that section 1777.5 is saved from preemption by section 514(d) of ERISA, codified at 29 U.S.C. § 1144(d), which provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." Boilermakers argue that the administrative order is saved in light of the Fitzgerald Act, 29 U.S.C. § 50 et seq., which provides:

> The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . .

29 U.S.C. § 50. These apprenticeship standards are set forth at 29 C.F.R. § 29.1-19.13 (1988). The regulations provide "a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval, and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor." *Siuslaw Concrete Construction Co. v. Washington, Department of Transportation*, 784 F.2d 952, 956 (9th Cir.1986).

Boilermakers argue that section 514(d), which saves "any rule or regulation issued under any [law of the United States]," saves section 1777.5 from preemption be-

cause section 1777.5 promotes and encourages the spread of approved apprenticeship programs established under the auspices of the Fitzgerald Act and the regulations of the Secretary of Labor.

The district judge addressed Boilermakers' argument at length, *see* 685 F.Supp. at 721-23, concluding that "[b]y no stretch of the imagination could § 1777.5 be considered a state law the preemption of which would impair federal law." *Id.* at 722. The court reasoned:

> The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. 29 U.S.C. § 50. The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, [of] acceptable apprenticeship programs." 29 C.F.R. § 29.1(b). Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.

Id. We adopt the district court's reasoning.

As they did in the district court, Boilermakers seek to invoke the Supreme Court's decision in *Shaw* to support their claim that section 514(d) saves the administrative order and California Labor Code § 1777.5 from preemption. In *Shaw*, appellants argued that section 514(d)

saved a New York human rights law which forbid discrimination in employee benefit plans on the basis of pregnancy. 463 U.S. at 100-06, 103 S.Ct. at 2901-04. Appellants in *Shaw* argued that preemption of the New York statute would "impair" or "modify" Title VII of the federal Civil Rights Act of 1964. *Id.* at 100-01, 103 S.Ct. 2901-02. The Court accepted this argument, but only insofar as the New York law prohibited employment practices that were also unlawful under Title VII. *See also id.* at 103-04, 103 S.Ct. at 2903-04 (New York statute not saved to the extent that it "prohibit[s] conduct that federal law permit[s]" since Title VII "in no way depends on such extensions for its enforcement"). The Court's holding in *Shaw* that parts of the state law were saved rested on (1) the presence in Title VII of a clause explicitly preserving nonconflicting state laws, and (2) Title VII's requirement that a claimant, before filing a charge with the federal Equal Employment Opportunity Commission (EEOC), first pursue available state administrative remedies. *Id.* at 101-02, 103 S.Ct. at 2902-03. The Court concluded:

> Given the importance of state fair employment laws to the federal enforcement scheme, preemption of the Human Rights Law would impair Title VII *to the extent that the Human Rights Law provides a means of enforcing Title VII's commands.* Before the enactment of ERISA, an employee claiming discrimination in connection with a benefit plan would have had his complaint referred to the New York State Division of Human Rights. If ERISA were interpreted to preempt the Human Right Law entirely with respect to covered benefit plans, the State no longer could prohibit the challenged employment practice and the state agency no longer would be authorized to grant relief. The EEOC thus would be unable to refer the claim to the state agency. This would frustrate the goal of *encouraging joint state/federal enforcement* of Title VII; an employee's only remedies for discrimination

> prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of *the enforcement scheme* contemplated by Title VII would, in the words of § 514(d), "modify" and "impair" federal law.

Id. at 102, 103 S.Ct. 2902 (emphasis added) (footnote omitted). The Court's conclusion clearly rested upon the fact that the New York law functioned as an enforcement mechanism for Title VII. That is simply not the case here. The Fitzgerald Act does not articulate a "goal of encouraging joint state/federal enforcement." Nor does the Fitzgerald Act contain any clause which preserves state laws. *See also* 685 F.Supp. at 722 (rejecting attempt to rely on *Shaw*).

We reject Boilermakers' argument that the Fitzgerald Act embodies a project in "cooperative federalism" which will be "impaired" or "modified" within the meaning of section 514(d) if the administrative order against Hydrostorage were preempted by ERISA. This argument relies on an overbroad reading of *Shaw* and on dicta in an out-of-circuit decision. *See Rebaldo v. Cuomo*, 749 F.2d 133, 139-40 (2d Cir.1984) (Van Graafeiland, Jr., "writing only for himself and not his colleagues" on issue of whether state law which panel concluded was not preempted under section 514(a) would also be saved under section 514(d), if it had been preempted). *cert. denied*, 472 U.S. 1008, 105 S. Ct. 2702, 86 L.Ed.2d 718 (1985). As the Court instructed in *Shaw*, ERISA's structure and legislative history "caution against applying [section 514(d)] too expansively." 463 U.S. at 104, 103 S.Ct. at 2903. "While § 514(d) may operate to exempt provisions of state law, upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive preemption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand § 514(d) into a more general saving clause." *Id.* We conclude that the Council's order is not saved from preemption by section 514(d) of ERISA. We also hold that as applied

in the Council's order, section 1777.5 is not saved from ERISA preemption. However, like the district court, we do not address whether section 1777.5 in its entirety is preempted by ERISA. 685 F.Supp. at 723.

Because we affirm the district court's judgment on the grounds that the Council's order is preempted by ERISA, we need not reach the issue of NLRA preemption.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C-87-2401-WWS, C-88-0804-WWS

HYDROSTORAGE, INC., A Tennessee corporation,
Plaintiff,

v.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; *et al.*,
Defendants.

HYDROSTORAGE, INC.,
Petitioner,

v.

DIVISION OF APPRENTICESHIP STANDARDS; GAIL JESSWEIN in his capacity as Chief Of The Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL; and BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE,
Respondents.

May 4, 1988

Karen E. Ford, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., for Hydrostorage, Inc.

John Rea, Dept. of Industrial Relations, San Francisco, Cal., for State defendants.

Julian O. Standen, Deputy Atty. Gen., San Francisco, Cal., for Susan Hamilton & R.T. Rinaldi.

Dalvin J. Abe, Deputy Atty. Gen., San Francisco, Cal., for California Apprenticeship Council.

David A. Rosenfeld, Van Bourg, Weinberg, Roger & Rosenfeld, San Francisco, Cal., for Boilermaker Joint Apprenticeship Committee.

MEMORANDUM OF OPINION AND ORDER

SCHWARZER, District Judge.

In these consolidated actions, Hydrostorage, Inc., seeks injunctive and other relief against the California Division of Apprenticeship Standards ("DAS"), the Northern California Boilermakers Local Joint Apprenticeship Committee ("JAC"), and other defendants to prevent the enforcement against Hydrostorage of an order of DAS issued pursuant to California Labor Code § 1777.5.

Hydrostorage initially sought to enjoin the DAS hearing on an administrative complaint filed against it by JAC for noncompliance with § 1777.5. The Court declined relief without prejudice, pending the issuance by DAS of a final order. A proposed order was issued on September 25, 1987, by a hearing officer. With minor modifications not relevant to the disposition of this matter,[1] the DAS Appeals Board affirmed the order on January 28, 1988, and the California Apprenticeship Council ("CAC") concurred. The order became effective March 1, 1988. Hydrostorage has exhausted its administrative remedies.

In the determination and order issued by DAS upon the complaint, it found that Hydrostorage was required to apply to the JAC for approval to train apprentices and to pay training fund contributions to the appropriate fund or CAC. The order imposes a civil penalty on Hydrostor-

[1] In substance, the Appeals Board eliminated one of the findings of willfulness.

age and denies it the right to seek any public works contract in California for a period of one year.

On March 3, 1988, Hydrostorage filed a new complaint for injunctive and other relief against enforcement of the order. It also filed an amended complaint in its original action seeking similar relief. Both plaintiff and defendants have moved for summary judgment. Counsel have had an opportunity to argue and comment on the Court's proposed ruling and their voluminous submissions have been considered. No material facts are in dispute and the matter is ripe for decision.

Jurisdiction

Hydrostorage seeks relief against enforcement of an order by DAS under § 1777.5 alleging preemption by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151. The complaint presents a federal question of which this Court has jurisdiction under 28 U.S.C. § 1331. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983).

The Statutory Scheme and the Material Facts

Labor Code § 1777.5 imposes certain requirements on every contractor performing contracts awarded by the State of California or its political subdivisions.[2] In substance, it requires that the contractor:

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[2] Section 1777.5 states in relevant part:

> When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment

1. Obtain a certificate from a joint apprenticeship committee approving the contractor under the

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and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship commitee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the areas of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ration of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section.

* * * *

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of

apprenticeship standards for employment and training of apprentices in the applicable craft;

2. Employ not less than one apprentice for each five journeymen employed in that craft on the public work; and

3. Contribute to an appropriate fund to administer and conduct the apprenticeship program in that craft.[3]

Under § 1777.7, willful noncompliance with § 1777.5 renders a contractor ineligible to bid on any public works project for one year and subjects him to a civil penalty.

Hydrostorage is a contractor engaged in the construction of water storage facilities. A large part of its work consists of public works contracts. The project giving rise to the instant controversy was a contract to construct water storage tanks for the Lathrop Water District. The work performed fell within the jurisdiction of the International Brotherhood of Boilermakers, Iron

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the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall apply a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

[3] Section 1777.5 provides for certain exemptions and alternatives not relevant here.

Shipbuilders, Blacksmiths, Forgers and Helpers ("Boile
makers"), a labor organization within the meaning
the NLRA, 29 U.S.C. § 152(5). It is not disputed th
§ 1777.5 applies to the project, that Hydrostorage did n
seek a certificate of approval, and that it employed
apprentices on the project.

During the relevant period, a collective bargainir
agreement was in effect between the Boilermakers ar
numerous employers, but not Hydrostorage. The agre
ment provided for the establishment and operation of
Appenticeship Committee and an Apprenticeship Fur
and specified contributions to be paid by each employ
to the Fund.[4] On September 25, 1986, the JAC, create
pursuant to the collective bargaining agreement, filed t
complaint with DAS leading to these proceedings, cha
ing Hydrostorage with failure to apply for a certifica
of approval, failure to employ apprentices, and failu
to contribute to the appropriate fund.

ERISA Preemption

ERISA subjects to federal regulation "employee we
fare benefit plans." It "is a comprehensive statute d
signed to promote the interests of employees and the
beneficiaries in employee benefit plans." *Shaw*, 463 U.
at 90, 103 S.Ct. at 2896. The term "employee welfa
benefit plan" is defined to "mean any plan, fund, or pr
gram . . . maintained by an employer or by an employ
organization, or by both, to the extent that . . . [it] w
established or is maintained for the purpose of providir

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[4] Detailed provisions for the operation of the apprenticeship p
gram are contained in a document entitled Boilermaker Standar
of Apprenticeship for Field Construction and Repair of Eig
Western States Area (as revised March 27, 1974). Artile XX
provides that "any expenses incurred for the administration of t
training program . . . shall be borne by the fund that has be
established," that being the fund provided for in the collective b
gaining agreement.

for its participants . . . apprenticeship or other training programs." 29 U.S.C. § 1002(1).

There can be no question that the Apprenticeship Program under the Boilermakers collective bargaining agreement falls within the literal scope of this definition. It comprises a plan, fund, and program maintained by employers and the bargaining representative of their employees to provide its participants with apprenticeship training.[5] That the Apprenticeship Fund itself may also be governed to an extent by other federal laws, as DAS argues, in no way takes the Apprenticeship Program out of the statutory definition.

Section 514(a) of ERISA states that the act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). "State law" is defined to consist of "all laws, decisions, rules, regulations or other State action having the effect of law." 29 U.S.C. § 1144(c)(1). "State" is defined as including "a State . . . or any [state] agency . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c)(2). Under these provisions, preemption depends on "whether the [state law] 'relate[s] to' employee benefit plans within the meaning of § 514(a)." *Shaw*, 463 U.S. at 96, 103 S.Ct. at 2899.[6]

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[5] Counsel for the JAC conceded as much at the hearing (Tr. 8, lines 11-17).

[6] In *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.1986), the court held that for a state law to be preempted it must "both 'relate[]' to an ERISA plan and 'purport[] to regulate, directly or indirectly' ERISA plans." The Supreme Court did not articulate such a two-pronged test in *Shaw* or elsewhere. It is apparently derived from two decisions of the Second Circuit. *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem. sub. nom., Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220, 103 S.Ct. 3564 77

"Congress used the words 'relate to' in § 514(a) in their broad sense." *Shaw*, 463 U.S. at 96, 103 S.Ct. at 2900. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 97, 103 S.Ct. at 2900. The DAS's determination and order issued under Section 1777.5 compel Hydrostorage to participate in and contribute to the Boilermakers Apprenticeship Program, an ERISA benefit plan. Thus they relate to an ERISA plan. *See generally Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D.Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978); *Standard Oil Co. of California v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980).

Moreover, the statute establishes the manner in which contractors must participate in the Apprenticeship Program and fund its costs. Thus, the statute regulates matters that are regulated by ERISA. *See, e.g.*, 29 U.S.C. §§ 1082, 1102-1104; *Martori Bros. Distributors*, 781 F.2d at 1357-58; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985).

L.Ed.2d 1405 (1983); *Rebaldo v. Cuomo*, 149 F.2d 133, 137 n. 1 (2d Cir.1984). *See also Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984).

A close reading of § 514 casts doubt on this interpretation. Section 514 preempts "any and all State laws insofar as they may . . . relate to any employee benefit plan." Section 514(c)(1) defines "state law" as "includ[ing] all laws, decisions, rules, regulations, or other State action having the effect of law." The reference to regulation of plans appears only in § 514(c)(2) defining "state" to include "a State, any political subdivision there, or any agancy or instrumentality of either which purports to regulate . . . the terms and conditions of employee benefit plans." Had Congress intended to limit preemption to those state laws that "regulate," it would presumably have included in subsection (c)(1) the words found in subsection (c)(2).

In any event, there can be no question but that § 1777.5 regulates apprenticeship program.

ERISA therefore preempts the DAS determination and order issued under § 1777.5 unless it is saved by § 514(d) which states

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.

Defendants argue that § 1777.5 was adopted pursuant to the Fitzgerald Act, 29 U.S.C. § 50, *et seq.*, and the regulations issued by the Secretary of Labor under the Act, 29 C.F.R. Part 29. Because federal law encourages the states to promote and regulate apprenticeship programs, they argue, "state law becomes a way to put into effect federal law. Thus, to interfere with that state law would necessarily 'alter . . ., modify . . ., impair . . . any law of the United States.'" JAC Memo at 6. Their argument rests on *Shaw* in which the Supreme Court applied § 514(d) to save from preemption so much of the New York Human Rights Law as prohibits discriminatory employment practices *that are also prohibited* by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

In *Shaw*, the Court had before it a state antidiscrimination law which, under the express provisions of Title VII, provided the enforcement mechanism for federal antidiscrimination law. As the Court put it,

> Title VII requires recourse to available state administrative remedies. When an employment practice prohibited by Title VII is alleged to have occurred in a State . . . which prohibits the practice and has established an agency to enforce the prohibition, the [EEOC] refers the charges to the state agency. The EEOC may not actively process the charges "before the expiration of sixty days after proceedings have been commenced under the State . . . law. . . ."

463 U.S. at 101-02, 103 S.Ct. at 2902. The Court concluded that "Given the importance of state fair employ-

ment laws to the federal enforcement scheme, pre-emption of the Human Rights Law would impair Title VII to the extent the Human Rights Law provides a means for enforcing Title VII's commands." *Id.* at 102, 103 S.Ct. at 2902. However insofar as state law imposed obligations beyond those imposed by federal law, ERISA preemption would not impair Title VII and therefore § 514(d) will not preclude preemption.

By no stretch of the imagination could § 1777.5 be considered a state law the preemption of which would impair federal law. The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. 29 U.S.C. § 50. The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, [of] acceptable apprenticeship programs." 29 C.F.R. § 29.1(b). Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.

Defendants also argue that footnote 24 of *Shaw* saves the DAS order on the theory that preemption would impair operation of the Fitzgerald Act insofar as the Act encourages states to give broader protection to apprentices than federal law may require. To begin with, the Fitzgerald Act contains no saving clause for state laws. *Shaw* concerned Title VII, which does contain such a clause. *See* Title VII, § 708, 42 U.S.C. § 2000e-7. More-

over, even with respect to Title VII, the Court said that it does no more than "simply [leave state antidiscrimination laws] where they were before the enactment of Title VII." *Shaw*, 463 U.S. at 103 n.24, 103 S.Ct. at 2903 n.24. The same is true here.

Finally, the lack of merit of defendants' argument is confirmed by comparing the Fitzgerald Act and the implementing regulations with ERISA, which shows that the former do not deal with the basic subject matter of ERISA, i.e., plan management and distribution of benefits. Specifically, the regulations are silent with respect to creation of or contributions to apprenticeship funds. Thus, there is no apparent conflict between regulations establishing standards for the welfare of apprentices and ERISA regulation of the administration of employee benefit plans which would invoke § 514(d). Presumably this was Congress's view when it included apprenticeship programs in ERISA without evident concern about conflict with the Fitzgerald Act.

Accordingly it must be concluded that § 514(d) does not save the order issued under § 1777.5 from ERISA preemption.[7]

It may, at first blush, seem odd, and perhaps farfetched, that ERISA should be held to preempt state law provisions and orders requiring public works contractors to participate in apprenticeship programs. However, as the Court stated in *Shaw*, "To give § 514(d) the broad construction advocated by [defendants] would defeat the intent of Congress to provide comprehensive pre-emption of state law." *Id.* at 106, 103 S.Ct. at 2904-05. Moreover, on examination, the program the state imposes on contractors falls squarely within the purposes of ERISA as recently articulated by the Supreme Court:

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[7] In view of this conclusion, it is unnecessary to consider whether § 1777.5 and § 1777.7 are also preempted as being enforcement schemes. *See Pilot Life Insurance Co. v. Dedeaux*, —— U.S. ——, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

> These statements reflect recognition of the administrative realities of employee benefit plans. An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States. A plan would be required to keep certain records in some States but not in others; to make certain benefits available in some States but not in others; to process claims in a certain way in some States but not in others; and to comply with certain fiduciary standards in some States but not in others.
>
> We have not hestitated to enforce ERISA's preemption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements.

Fort Halifax Packing Co., Inc. v. Coyne, —— U.S. ——, 107 S.Ct. 2211, 2216, 96 L.Ed2d 1 (1987).[8]

Defendants concede that the Boilermakers Apprenticeship Fund is subject to ERISA as well as the Labor-Management Relations Act, 29 U.S.C. § 186(c)(6), but argue that the JAC is a separate entity. The argument, of course, misconceives the issue which is that state law

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[8] The Boilermakers Fund is identified in the collective bargaining agreement as the Nine Western States Area Apprenticeship Fund. Thus contributions are obviously made by employers in different states.

requires public works contractors to participate in an ERISA-type benefit program and contribute to an ERISA fund.

The holding that the DAS determination and order under § 1777.5 are preempted by ERISA should not be taken as denigrating the desirability of apprenticeship programs, invalidating the State's policy to promote such programs, and denying state authority to regulate the conditions of employment of apprentices. The Court recognizes that federal policy favors "the formulation of programs of apprenticeship," as reflected in the Fitzgerald Act, 29 U.S.C. § 50, *et seq.*

The Court has not been asked to strike down § 1777.5 nor does it do so by this order which holds only that as applied in this case it is preempted by ERISA. In light of what has been said here about the Fitzgerald Act and the implementing regulations, the State may be able to adopt standards to safeguard the welfare of apprentices that do not run afoul of ERISA. In any event, that is not an issue that need be decided here.

NLRA Preemption

It is not disputed that in order to participate in the apprenticeship program mandate by the DAS order, Hydrostorage would have to execute an Agreement to Train Apprentices. Under the terms of that Agreement, Hydrostorage would become bound by the Apprenticeship Standards and Apprenticeship Agreement which are a part of the Boilermakers collective bargaining agreement as Appendix D.

Under Appendix D, the employer agrees, among other thing, to be bound by the agreement and declaration of trust establishing the Boilermakers Area Apprenticeship Funds and any amendments, and to make contributions to the Funds as required by the JAC. The collective bargaining agreement itself contains provisions respecting

the employment of apprentices, including rates of pay and the minimum ratio of apprentices to journeymen. By signing the Agreement to Train Apprentices, the employer apparently becomes bound by these provisions.

Thus, by requiring Hyrostorage to execute the Boilermakers Agreement to Train Apprentices, the order would make it an involuntary party to Appendix D and certain other provisions of the collective bargaining agreement, although it had no part in the negotiation of that agreement and has not accepted it. It would, moreover, be subject not only to those agreements but also to any future changes that may be negotiated by the union and the employer parties.[9]

The Supreme Court has only recently summarized the controlling principles:

> Last Term, in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 [105 S.Ct. 2380, 85 L.Ed.2d 728] (1985), we again noted: "The Court has articulated two distinct NLRA preemption principles." *Id.* at 748 [105 S.Ct. at 2394]. See also *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-499 [103 S.Ct. 3172, 3176-3177, 77 L.Ed.2d 798] (1983). The first, the so-called *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon*, 350 U.S. 236 [76 S.Ct. 773, 3 L.Ed.2d 775] (1959), prohibits States from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of*

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[9] Section 1777.5 provides that "where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council." None of the parties contends that this exception applies here. But even if it did and if it gave Hydrostorage an option to make its contribution to the CAC, Hydrostorage would still be required under § 1777.5 "to apply to the joint apprenticeship committee administering the apprenticeship standards of the craft," in this case the Boilermakers. And that application, as has been seen, has the effect of making it an involuntary party to substantial portions of the collective bargaining agreement.

Industry v. Gould Inc., ante [475 U.S.] at 286 [106 S.Ct. 1057, 89 L.Ed.2d 223 (1986)]. The *Garmon* rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by NLRA. *Ante*, at 289 [106 S.Ct. at 1062]. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S., at 748, and n. 26 [105 S.Ct. at 2394 and n. 26]. . . . Although the labor-management relationship is structured by the NLRA, certain areas intentionally have been left " 'to be controlled by the free play of economic forces.' " *Machinists*, 427 U.S., at 140 [96 S.Ct. at 2553], quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 [92 S.Ct. 373, 377, 30 L.Ed.2d 328] (1971). The Court recognized in *Machinists* that " 'Congress has been rather specific when it has come to outlaw particular economic weapons,' " 427 U.S., at 143 [96 S.Ct. at 2555], quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 498 [80 S.Ct. 419, 421, 4 L.Ed.2d 454] (1960), and that Congress' decision to prohibit certain forms of economic pressure while leaving others unregulated represents an intentional balance " 'between the uncontrolled power of management and labor to further their respective interests.' " *Machinists*, 427 U.S. at 146 [96 S.Ct. at 2556], quoting *Teamsters v. Morton*, 377 U.S. 252, 258-259 [85 S.Ct. 1253, 1257-1258, 12 L.Ed.2d 280] (1964). States are therefore prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, see 427 U.S., at 147 [96 S.Ct. at 2556], unless such restrictions presumably were contemplated by Congress.

Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613-15, 106 S.Ct. 1395, 1398-99, 89 L.Ed.2d 616 (1986).

By requiring Hydrostorage to become a party to certain provisions of the Boilermakers collective bargaining agreement, DAS is intruding into the area of collective bargaining from which Congress under the NLRA has excluded it. As the Court explained in *Golden State:* "The NLRA requires an employer and a union to bargain in good faith, but it does not require them to reach agreement." *Id.* at 616, 106 S.Ct. at 1399-1400. It is clear that a state cannot penalize an employer for not becoming a party to a collective bargaining agreement, in whole or in part, which it did not voluntarily negotiate.

Because application of the DAS determination and order would in this case have that effect, it is barred by the NLRA independent of ERISA preemption.

Conclusion

For the reasons stated, the motion of Hydrostorage for summary judgment is granted. Defendants are permanently enjoined from enforcing the DAS determination and order against Hydrostorage in connection with the Lathrop project.

Defendants' motions for summary judgment are denied.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

88-2798, 88-2800,
88-2802, 88-2966
88-2968, 88-2969

CV-87-2401-WWS
CV-88-804-WWS

HYDROSTORAGE, INC., a Tennessee Corporation,
Plaintiff-Appellee,

vs.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, in his capactity as Chief of the Division of Apprenticeship Standards, CALIFORNIA APPRENTICESHIP COUNCIL,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
(San Francisco)

JUDGMENT

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered 12-06-89.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-2798, 88-2800,
88-2802, 88-2966,
88-2968, 88-2969

D.C. Nos.
CV-87-2401-WWS
CV-88-804-WWS

HYDROSTORAGE, INC., a Tennessee Corporation,
Plaintiff-Appellee,

vs.

NORTHERN CALIFORNIA BOILERMAKERS LOCAL JOINT APPRENTICESHIP COMMITTEE, an unincorporated association; DIVISION OF APPRENTICESHIP STANDARDS; GAIL W. JESSWEIN, in his capacity as Chief of the Division of Apprenticeship Standards; CALIFORNIA APPRENTICESHIP COUNCIL,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California

ORDER DENYING REHEARING

[Filed Mar. 16, 1990]

Before: WALLACE and NOONAN, Circuit Judges,
and BURNS,* District Judge.

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* Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX E

1. The relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, are as follows:

Section 3(1), 29 U.S.C. § 1002(1):

> For purposes of this subchapter:
>
> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 514, 29 U.S.C. § 1144:

> (a) Supersedure; effective date
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * * *

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefits covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(a) of this title) or any rule or regulation issued under any such law.

* * * *

2. Section 1 of the National Apprenticeship Act of 1937 ("Fitzgerald Act"), 29 U.S.C. § 50, provides as follows:

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Secretary of Education in accordance with section 17 of title 20. For

the purposes of this chapter the term "State" shall include the District of Columbia.

3. The relevant provisions of the California Labor Code are as follows:

§ 1777.5. **Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade; exemptions; contributions**

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as es-

tablished by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or commttees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor, if he is covered by this section, upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involv-

ing less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis

the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

§ 1777.7. Noncompliance with § 1777.5 denial of right to bid on contracts; withholding civil penalty from progress payments; procedure

(a) In the event a contractor willfully fails to comply with the provisions of Section 1777.5, such contractor shall:

(1) Be denied the right to bid on any public works contract for a period of one year from the date the determination of noncompliance is made by the Administrator of Apprenticeship; and

(2) Forfeit as a civil penalty in the sum of fifty dollars ($50) for each calendar day of noncompliance. Notwithstanding the provisions of Section 1727, upon receipt of such a determination the awarding body shall withhold from contract progress payments then due or to become due such sum.

(b) Any such determination shall be issued after a full investigation, a fair and impartial hearing, and reasonable notice thereof in accordance with reasonable rules and procedures prescribed by the California Apprenticeship Council.

(c) Any funds withheld by the awarding body pursuant to this section shall be deposited in the General Fund if the awarding body is a state entity, or in the equivalent fund of an awarding body if such awarding body is an entity other than the state.

The interpretation and enforcement of Sections 1777.5 and 1777.7 shall be in accordance with the rules and procedures of the California Apprenticeship Council.

§ 3070. Apprenticeship council; composition; appointment; terms; compensation; traveling expenses

There is in the Division of Apprenticeship Standards the California Apprenticeship Council, which shall be appointed by the Governor, composed of six representatives each from employer and employee organizations, respectively, geographically selected, and of two representatives of the general public. The Director of Industrial Relations, or his or her permanent and best qualified designee, and the Superintendent of Public Instruction, or his or her permanent and best qualified designee, and the Chancellor of the California Community Colleges, or his or her permanent and best qualified designee, shall also be members of the California Apprenticeship Council. The chairman shall be elected by vote of the California Apprenticeship Council. Beginning with appointments in 1985, three representative each of employers and employees, and one public representative shall serve until January 15, 1989. In 1987, three representatives each of the employers and employees, and one public representative shall serve until January 15, 1991. Any member whose term expires on January 15, 1986, shall continue to serve until January 15, 1987. Thereafter each member shall serve for a term of four years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his or her predecessor shall be appointed for the remainder of that term. Each member of the council shall receive the sum of fifty dollars ($50) for each day of actual attendance at meetings of the council, for each day of actual attendance at hearings by the council or a committee thereof pursuant to Section 3082, and for each day of actual attendance at meetings of other committees established by the council and approved by the Director of Industrial

Relations, together with his or her actual and necessary traveling expenses incurred in connection therewith.

§ 3071. Powers and duties of council

The California Apprenticeship Council shall meet at the call of the Director of Industrial Relations and shall aid him or her in formulating policies for the effective administration of this chapter.

Thereafter, the California Apprenticeship Council shall meet quarterly at a designated date and special meetings may be held at the call of the chairman. The California Apprenticeship Council shall issue rules and regulations which establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements, hereinafter in this chapter referred to as apprenticeship standards, which in no case shall be lower than those prescribed by this chapter; and shall issue rules and regulations governing equal opportunities in apprenticeship, affirmative action programs which include women and minorities in apprenticeship, and other on-the-job training, and criteria for selection procedures with a view particularly toward eliminating criteria not relevant to qualification for training employment or more stringent than is reasonably necessary. The California Apprenticeship Council shall make biennial reports through the Director of Industrial Relations of its activities and findings to the Legislature and to the public.

§ 3075. Apprenticeship program sponsors; approval of programs; joint sponsorship; composition of joint committees

An apprenticeship program sponsor may be a joint apprenticeship committee, unilateral management or labor apprenticeship committee, or an individual em-

ployer. Programs may be approved by the chief in any trade in the state or in a city or trade area, whenever the apprentice training needs justifies the establishment. Where a collective bargaining agreement exists, a program shall be jointly sponsored unless either party to the agreement waives its right to representation in writing. Joint apprenticeship committees shall be composed of an equal number of employer and employee representatives.

§ 3075.1. Apprenticeship as form of on-the-job training

It is the public policy of this state to encourage the utilization of apprenticeship as a form of on-the-job training, when such training is cost-effective in developing skills needed to perform public services. State and local public agencies shall make a diligent effort to establish apprenticeship programs for apprenticeable occupations in their respective work forces. In furtherance of this policy, public agencies shall take into consideration (a) the extent to which a continuous supply of trained personnel is readily available to public agencies to meet their skill requirements in the various occupations which are determined to be apprenticeable, and (b) the application of established programs in the private sector, where appropriate. Public sector apprenticeship programs should be fully compatible with affirmative action goals for the participation of minorities and women in apprenticeship programs.

§ 3076. Function of committees

The function of a joint apprenticeship committee, when specific written authority is delegated by the parent organizations represented, shall be to establish work processes, wage rates, working conditions for apprentices, the number of apprentices which

shall be employed in the trade under apprentice agreements, and aid in the adjustment of apprenticeship disputes in accordance with standards for apprenticeship set up by the California Apprenticeship Council. Disciplinary proceedings resulting from disputes shall be duly noticed to the involved individuals.

§ 3076.3. Program sponsors; duties

Program sponsors shall establish selection procedures which specify minimum requirements for formal education or equivalency, physical examination, if any, subject matter of written tests and oral interviews, and any other criteria pertinent to the selection process; shall specify the relative weights of all factors which determine selection to an apprenticeship program; shall submit in writing to the chief an official statement of each selection procedure including the filing date and location of the program sponsor; shall make a copy of the selection procedures available to each applicant; shall provide in writing to each applicant not selected an official explanation setting forth the reason or reasons for the nonselection, copies of which shall be retained as a public record in the files of the program sponsor for a period of five years; and shall implement affirmative action programs for minorities and women in accordance with the rules, regulations, and guidelines of the California Apprenticeship Council.

§ 3077. Apprentice and apprenticeship agreement defined; term of apprenticeship

The term "apprentice" as used in this chapter, means a person at least 16 years of age who has entered into a written agreement, in this chapter called an "apprentice agreement," with an employer or program sponsor. The term of apprenticeship for each apprenticeable occupation shall be approved by

the chief, and in no case shall provide for less than 2,000 hours of reasonably continuous employment for such person and for his or her participation in an approved program of training through employment and through education in related and supplemental subjects.

§ 3078. Apprenticeship agreement; required provisions

Every apprentice agreement entered into under this chapter shall directly, or by reference, contain:

(a) The names of the contracting parties.

(b) The date of birth of the apprentice.

(c) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.

(d) A statement showing the number of hours to be spent by the apprentice in work and the learning objectives to be accomplished through related and supplemental instruction, except as otherwise provided under Section 3074. These exceptions shall be subject to the appeal procedures established in Sections 3081, 3083, and 3084. A minimum of 144 hours of related and supplemental instruction for each year of apprenticeship is recommended; however, related instruction may be expressed in terms of units or other objectives to be accomplished. In no case shall the combined weekly hours of work and required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age of the apprentice.

(e) A statement setting forth a schedule of the processes in the trade or industry divisions in which the apprentice is to be taught and the approximate time to be spent at each process.

(f) A statement of the graduated scale of wages to be paid the apprentice and whether the required schooltime shall be compensated.

(g) A statement providing for a period of probation of not more than 1,000 hours of employment and not more than 72 hours of related instruction, during which time the apprentice agreement may be terminated by the program sponsor at the request in writing of either party, and providing that after the probationary period the apprentice agreement may be terminated by the administrator by mutual agreement of all parties thereto, or canceled by the administrator for good and sufficient reason.

(h) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally, or which are not covered by collective-bargaining agreement, shall be submitted to the administrator for determination as provided for in Section 3081.

(i) A provision that an employer who is unable to fulfill his or her obligation under the apprentice agreement may, with approval of the administrator, transfer the contract to any other employer if the apprentice consents and the other employer agrees to assume the obligation of the apprentice agreement.

(j) Such additional terms and conditions as may be prescribed or approved by the California Apprenticeship Council, not inconsistent with the provisions of this chapter.

(k) A clause providing that there shall be no liability on the part of the other contracting party for an injury sustained by an apprentice engaged in schoolwork at a time when the employment of the apprentice has been temporarily or permanently terminated.

§ 3079. Approval and execution of agreement; agreement binding during majority of apprentice

Every apprentice agreement under this chapter shall be approved by the local joint apprenticeship committee or the parties to a collective bargaining agreement or, subject to review by the council, by the administrator where there is no collective bargaining agreement or joint committee, a copy of which shall be filed with the California Apprenticeship Council. Every apprentice agreement shall be signed by the employer, or his agent, or by a program sponsor, as provided in Section 3080, and by the apprentice, and if the apprentice is a minor, by the minor's parent or guardian. Where a minor enters into an apprentice agreement under this chapter for a period of training extending into his or her majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority.

4. The relevant Department of Labor regulations, 29 C.F.R. § 29.1 *et seq.*, are as follows:

§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare * * *." Section 2 of

the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint national advisory committees * * *." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, polices and procedures cover the registration, cancellation and deregistration of apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

§ 29.3 Eligibility and procedure for Bureau registration of a program.

(a) Eligibility for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and

the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR Part 30, as amended.

(c) Except as provided under paragraph (d) of this section, apprentices must be individually registered under a registered program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to prior Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(d) The names of persons in their first 90 days of probationary employment as an apprentice under an apprenticeship program registered by the Bureau or a recognized State Apprenticeship Agency, if not individually registered under such program, shall be submitted immediately after employment to the Bureau or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate registration office must be promptly notified of the cancellation, suspension, or termination of any apprenticeship agreement, with cause for same, and of apprenticeship completions.

(f) Operating apprenticeship programs when approved by the Bureau shall be accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registration and/or approval evidenced by a similar certificate or other written

indicia. When approved by the Bureau, national apprenticeship standards for policy or guideline use shall be accorded certification, evidenced by a certificate attesting to the Bureau's approval.

(g) Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.

(h) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(i) Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers.

§ 29.4 Criteria for apprenticeable occupations.

An apprenticeable occupation is a skilled trade which possesses all of the following characteristics:

(a) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(b) It is clearly identified and commonly recognized throughout an industry.

(c) It involves manual, mechanical, technical skills and knowledge which require a minimum of 2,000 hours of on-the-job experience.

(d) It requires related instruction to supplement the on-the-job training.

§ 29.5. Standards of apprenticeship.

An apprenticeship program to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an organized written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CFR 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,000 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work process in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year of apprenticeship is recommended. Such instruction may be given in a classroom through trade or industrial courses, or by correspondence courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) A progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of the apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exists. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice

to the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor;

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause;

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provision of 29 CFR Part 30, as amended, or a State EEO in apprenticeship plan adopted pursuant to 29 CFR Part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau or recognized State Apprenticeship Agency and other applicable law.

§ 29.6 Apprenticeship agreement.

The apprenticeship agreement shall contain explicitly or by reference:

(a) Names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and the signature of a parent or guardian if the apprentice is a minor.

(b) The date of birth of apprentice.

(c) Name and address of the program sponsor and registration agency.

(d) A statement of the trade or craft in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship.

(e) A statement showing (1) the number of hours to be spent by the apprentice in work on the job, and (2) the number of hours to be spent in related and supplemental instruction which is recommended to be not less than 144 hours per year.

(f) A statement setting forth a schedule of the work processes in the trade or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process.

(g) A statement of the graduated scale of wages to be paid the apprentice and whether or not the required school time shall be compensated.

(h) Statements providing:

(1) For a specific period of probation during which the apprenticeship agreement may be terminated by either party to the agreement upon written notice to the registration agency;

(2) That, after the probationary period, the agreement may be cancelled at the request of the apprentice, or may be suspended, cancelled, or terminated by the sponsor, for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration agency of the final action taken.

(i) A reference incorporating as part of the agreement the standards of the apprenticeship program as it exists on the date of the agreement and as it may be amended during the period of the agreement.

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex.

(k) Name and address of the appropriate authority, if any, designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established trade procedure or applicable collective bargaining provisions.

§ 29.12 Recognition of State agencies.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Secretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition by the SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Opportunity in Apprenticeship;

(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with ap-

plicable requirements as set forth in this part. Acceptable State provisions shall:

(1) Establish the apprenticeship agency in: (i) The State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations governing wages, hours, and working conditions, or (iii) that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

(2) Require that the State Apprenticeship Council be composed of persons familiar with apprenticeable occupations and an equal number of representatives of employer and of employee organizations and may include public members who shall not number in excess of the number named to represent either employer or employee organizations. Each representative so named shall have one vote. Ex officio members may be added to the council but they shall have no vote except where such members have a vote according to the established practice of a presently recognized council. If the State official who directs the apprenticeship program is a member of the council, provision may be made for the official to have a tie-breaking vote;

(3) Clearly delineate the respective powers and duties of the State official and of the council;

(4) Clearly designate the officer or body authorized to register and deregister apprenticeship programs and agreements;

(5) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR Part 30, as amended, and to require apprenticeship programs to

operate in conformity with such State Plan and 29 CFR Part 30, as amended;

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in "apprenticeable" occupations as defined in § 29.4;

(8) Provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeship Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity;

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; and

(10) Provide that under a program proposed for registration by an employer or employers' association, and where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgment of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of

its application for registration and of the apprenticeship program. The State agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(c) *Application for recognition.* A State Apprenticeship Agency/Council desiring recognition shall submit to the Administrator, BAT, the documentation specified in § 29.12(a) of this part. A currently recognized Agency/Council desiring continued recognition by the Bureau shall submit to the Administrator the documentation specified in § 29.12(a) of this part on or before July 18, 1977. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State agency but the Administrator shall not extend the time for submission of the documentation required by § 29.12 (a). The recognition of currently recognized Agencies/Councils shall continue until July 18, 1977 and during any extension period granted by the Administrator.

(d) *Appeal from denial of recognition.* The denial by the Administrator of a State agency's application for recognition under this part shall be in writing and shall set forth the reasons for the denial. The notice of denial shall be sent to the applicant by certified mail, return receipt requested. The applicant may appeal such a denial to the Secretary by mailing or otherwise furnishing to the Administrator, within 30 days of receipt of the denial, a notice of appeal addressed to the Secretary and setting forth the following items:

(1) A statement that the applicant appeals to the Secretary to reverse the Administrator's decision to deny the application;

(2) The date of the Administrtor's decision and the date the applicant received the decision;

(3) A summary of the reasons why the applicant believes that the Administrator's decision was incorrect;

(4) A copy of the application for recognition and subsequent modifications, if any;

(5) A copy of the Administrator's decision of denial. Within 10 days of receipt of a notice of appeal, the Secretary shall assign an Administrative Law Judge to conduct hearings and to recommend findings of fact and conclusions of law. The proceedings shall be informal, witnesses shall be sworn, and the parties shall have the right to counsel and of cross-examination.

The Administrative Law Judge shall submit the recommendations and conclusions, together with the entire record to the Secretary for final decision. The Secretary shall make his final decision in writing within 30 days of the Administrative Law Judge's submission. The Secretary may make a decision granting recognition conditional upon the performance of one or more actions by the applicant. In the event of such a conditional decision, recognition shall not be effective until the applicant has submitted to the Secretary evidence that the required actions have been performed and the Secretary has communicated to the applicant in writing that he is satisfied with the evidence submitted.

(e) *State apprenticeship programs.* (1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity

in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended;

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR Part 30, as amended.

5. Section 212 of Title 8 of the California Code of Regulations, 8 C.C.R. § 212, provides as follows:

Apprenticeship programs shall be established by written standards approved by the Chief DAS. The standards shall be approved only when they cover all work performed within the apprenticeable occupation, conform to applicable law, and contain:

(a) Evidence of:

(1) work site facilities and equipment sufficient to train the apprentice(s);

(2) skilled workers as trainers at the work site(s);

(3) adequate arrangements for related and supplemental instruction pursuant to Labor Code Section 3074;

(4) ability to offer training and supervision in all work processes of the apprenticeable occupation(s);

(5) provisions for evaluation of on-the-job training and related and supplemental instruction;

(b) A statement of the:

(1) occupation(s);

(2) party or parties to whom the standards apply and the geographic area;

(3) definition and duties of the apprentice;

(4) working conditions of the apprentice;

(5) current applicable journeyman wage or wages;

(6) ratio or number of apprentices to be employed and the method of determining such ratio;

(7) mechanism that will be used to provide apprentices with reasonably continuous employment in the event of a lay-off or the inability of an employer to provide training in all work processes as outlined in the standards;

(8) requirement for incorporating the provisions of the standards into the apprentice agreement.

(c) Provisions for:

(1) establishment of an apprenticeship committee if applicable;

(2) administration of the standards;

(3) establishment of rules and regulations governing the program;

(4) determining the qualifications of employers if other than single employer programs;

(5) determining the qualifications of apprentice applicants;

(6) an apprentice worksite job progress and related and supplemental instruction record system;

7) graduated minimum wage schedules to be paid during the term of training, and applied uniformly to all employers subject to the standards, as applicable;

(A) wage progression schedule shall be in accordance with the collective bargaining agreement, if contained therein;

(B) where the program is not subject to collective bargaining, the wage progression schedule shall be determined by the program sponsor in consultation with the Division of Apprenticeship Standards and shall in no case be less than ten percent (10%) per year, when the entry wage is based on fifty percent (50%) of the current journeyman wage.

(8) discipline of apprentices and including provisions for fair hearings;

(9) termination or recommendation of cancellation of apprentice agreements;

(10) recommending issuance of State Certificates of Completion of Apprenticeship pursuant to Section 224 of this Chapter;

(11) revision of standards;

(12) training and education of the apprentice in first aid, safe working practices and in the recognition of occupational health and safety hazards;

(13) fair and impartial treatment of applicants for apprenticeship, selected through uniform selection procedures, which shall be an addendum to the standards, pursuant to Section 215 of this Chapter;

(14) mobility between employers when essential to provide exposure and training in various work processes in the apprenticeable occupation;

(15) approval of the standards by the Chief DAS.

(d) The names and signatures of the parties.